

No. 34764-8-III

**IN THE COURT OF THE APPEALS
OF THE STATE OF WASHINGTON**

DIVISION III

THE STATE OF WASHINGTON, Respondent

v.

MARKHAM M.W. WELCH, Appellant.

BRIEF OF RESPONDENT

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I. SUMMARY OF ISSUES

1. SHOULD THE APPELLANT'S CONVICTIONS BE REVERSED FOR INEFFECTIVE ASSISTANCE OF COUNSEL BASED UPON TRIAL COUNSEL INITIALLY DECLINING TO OBJECT TO EVIDENCE CONCERNING THE GENESIS OF THE NARCOTICS INVESTIGATION?

2. DID THE DETECTIVE GIVE IMPROPER OPINION TESTIMONY IN DESCRIBING HIS OBSERVATION ITEMS OF EVIDENCE DISCOVERED DURING EXECUTION OF THE SEARCH WARRANT AND THE SIGNIFICANCE OF EACH BASED UPON HIS TRAINING AND EXPERIENCE?

3. DID THE TRIAL COURT ABUSE ITS DISCRETION IN IMPOSING CERTAIN LEGAL FINANCIAL OBLIGATIONS WHICH WERE EITHER MANDATORY, OR DISCRETIONARY AND DO NOT REQUIRE CONSIDERATION OF THE APPELLANT'S ABILITY TO PAY?

II. SUMMARY OF ARGUMENT

1. THE APPELLANT'S CONVICTIONS SHOULD BE AFFIRMED BECAUSE TRIAL COUNSEL'S DECISION NOT TO INITIALLY OBJECT AND THEN LATER OBJECT BASED UPON HEARSAY WAS REASONABLE AND THE APPELLANT WAS NOT PREJUDICED IN LIGHT OF THE OVERWHELMING EVIDENCE OF GUILT.
2. THE DETECTIVE GAVE PROPER OBSERVATION TESTIMONY IN DESCRIBING ITEMS OF EVIDENCE DISCOVERED DURING EXECUTION OF THE SEARCH WARRANT AND THE SIGNIFICANCE OF EACH BASED UPON HIS TRAINING AND EXPERIENCE.
3. THE TRIAL COURT PROPERLY IMPOSED LEGAL FINANCIAL OBLIGATIONS.
 - A. Imposition of the VUCSA fine is discretionary and does not require consideration of the Appellant's ability to pay.
 - B. Imposition of the Crime Lab fee is mandatory and does not require consideration of the Appellant's ability to pay.

- C. Imposition of the criminal filing fee is mandatory and does not require consideration of the Appellant's ability to pay, and its imposition in a criminal conviction is constitutional.

III. STATEMENT OF THE CASE

In May of 2016, Detective Bryson Aase received information that the Appellant, Markham Welch, was trafficking methamphetamine from his residence, a single wide trailer, in the Clarkston Heights in Asotin County, Washington. RP 80-84. The Appellant was known to law enforcement as being a long standing member of the drug community, but the information indicated that he had begun dealing in much larger quantities. RP 80. Det. Aase determined then to conduct a specific investigation into the Appellant's narcotics activities. RP 81.

A neighboring agency contacted Det. Aase and advised that they had a confidential informant¹ (hereinafter CI) with information that the Appellant was selling methamphetamine. RP 81. Det. Aase contacted the CI who advised that he could purchase methamphetamine from the Appellant. RP 83.

On May 27, 2016, Det. Aase conducted the first of two

¹The State objects to Appellant Counsel's characterization of the informant as "the State's snitch witness" and further objects to counsel naming the informant in the brief. There is no argument proffered to the Court in this appeal that necessitates such identification or characterization and was done for no apparent purpose other than to publicize the identity of the confidential informant and subject the informant to public scorn. This is especially apparent where the Appellant's stated motive in proceeding to trial was to "make sure that [the CI] doesn't do this to anyone else," and where someone connected to the Appellant used a phone to video and audio record the CI's trial testimony and then posted it to social media. RP 429-430. This type of conduct can further lead to physical retaliation against the informant and such needless "public shaming" should not be tolerated or condoned by the courts. That this conduct was continued by Appellate Counsel is inexcusable. The State would request that the offending portion of the Appellant's brief be stricken.

controlled purchases of methamphetamine from the Appellant. RP 85. Det. Aase had the CI contact the Appellant and arrange to purchase two hundred dollars (\$200.00) worth of methamphetamine. RP 85. The CI was searched and then provided pre-recorded buy money,² and given instructions concerning how to proceed. RP 85-86. The CI was dropped off in the area of the Appellant's residence and observed by detectives as he approached and entered. RP 86-87. After approximately ten minutes, the CI exited and was surveilled walking to a location where he was picked up by Det. Aase. RP 87. The CI then provided Det. Aase with a quantity of methamphetamine that he purchased from the Appellant. RP 87-88, 282-286. The CI was searched afterward to confirm the absence of other money or contraband. RP 88.

On June 7, 2016, and based upon new information received by law enforcement, Det. Aase arranged the second controlled buy from the Appellant. RP 97-98. The CI was directed to contact the Appellant and arrange to purchase a quantity of methamphetamine. RP 98. Upon confirmation that the Appellant was willing to sell the CI methamphetamine, the detectives met with the CI, and again conducted a pre-buy search. RP 98. The CI was again provided with two hundred dollars (\$200.00) of pre-recorded buy money, but this

²Officers record the serial numbers of the bills used so that if it is later recovered during a search warrant, it can be identified. RP 74.

time was fitted with a recording/transmitting device. RP 98-100. This device not only recorded sound, but allowed officers to monitor the transmission in real time. RP 101. The CI was again instructed on how to proceed and was transported to the area of the Appellant's home. RP 101. Detectives observed the CI walk to the Appellant's residence and saw the CI contact the Appellant in the driveway. RP 101-102. The Appellant was getting ready to drive away, but told the CI to go into the house and wait for him to return. RP 102.

The Appellant returned approximately six minutes later and contacted the CI inside his trailer. RP 102-103. The Appellant then weighed out and provided approximately a quarter ounce of methamphetamine to the CI. RP 294-295. The CI was inside the residence for approximately fifteen minutes before exiting and again meeting with detectives where he provided Det. Aase with the methamphetamine he purchased from the Appellant. RP 103. The CI was again searched with negative results. RP 103. The CI advised there was a significant quantity of additional methamphetamine in the residence. RP 104-105. Based upon this information, Det. Aase decided to apply for a search warrant for the Appellant's trailer. RP 105, 132-133.

On June 8, 2016, detectives executed a search warrant for the Appellant's trailer. RP 133. Upon entry, the Appellant was detained and advised concerning the search warrant. RP 138. The Appellant

claimed that he was merely a user. RP 138. A search of his person incident to arrest revealed a small baggie containing a "rock" of methamphetamine and seven hundred ninety-three dollars (\$793.00). RP 138. Included in this cash was the two hundred dollars (\$200.00) of the pre-recorded buy money from the second controlled purchase the day before. RP 142.

During the search of the residence, officers found a plastic bag containing approximately a quarter pound of methamphetamine.³ RP 149-150. This was discovered inside a cowboy hat that was hanging in the Appellant's bedroom. RP 145-146. Additionally, officers found a triple beam scale, a set of digital scales, small ziplock baggies (packaging material), multiple cell phones, and some paraphernalia for ingesting controlled substances. RP 143, 145, 150, 151, 161, 162. The ziplock baggies were consistent with the packaging used in the two controlled purchases. RP 152. Also located was a surveillance camera system. RP 157. Located in the living room area was a realistic appearing BB pistol and a BB rifle. RP 159-160. Leaning against the back door was a baseball bat. RP 160.

The Appellant was transported to the Asotin County Jail and

³The Appellant incorrectly asserts that the State elected to rely upon the single rock of methamphetamine found on the Appellant's person to support the charge of Possession of a Controlled Substance with Intent to Deliver. Brief of Appellant (hereinafter Brief), p. 5. fn. 1. The State actually elected to rely upon the quarter pound of methamphetamine found in the hat to support this charged and used the smaller bag by contrast to demonstrate personal use amount from sales supply amounts. RP 344, 390-391.

while in transport, he advised the officer that he wished to speak with Det. Aase. RP 166. Prior to his transport, Det. Aase had advised him of his rights pursuant to Miranda.⁴ RP 16, Clerks Papers (*hereinafter* CP) 18-20. After completing execution of the search warrant, Det. Aase met with the Appellant and interviewed him at the jail. RP 168. The Appellant was reminded of his rights read earlier to him which he stated he understood and waived, agreeing to speak with officers. RP 20.

During his recorded interview, the Appellant admitted to selling methamphetamine. RP 169. The Appellant identified his supplier and admitted he was procuring and selling approximately a quarter pound of methamphetamine per week. RP 170. The Appellant stated he purchased that amount for about two thousand dollars (\$2,000.00) and made between four hundred (\$400.00) to five hundred dollars (\$500.00) profit.

Further investigation revealed that the Appellant's trailer, where all the percipient criminal acts occurred, was within a thousand feet of two different school bus stops as designated by the local school district. RP 182-184, 260-265, 326-330.

The Appellant was ultimately charged with two counts of Delivery of a Controlled Substance (Methamphetamine) and

⁴Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966).

Possession of a Controlled Substance with Intent to Deliver (Methamphetamine), each with an allegation that the crime was committed within one thousand feet of a school bus stop. CP 31-33.

The matter proceeded to trial on September 29, 2016, and the jury heard testimony from Det. Aase. RP 57, 61. During his trial testimony, Det. Aase was questioned regarding the genesis of his investigation in this case and he testified that he had been familiar with the Appellant for a "long time." RP 80. Defense counsel did not object at that point. RP 80. The State's attorney then directed the detective to more recent events, and Det. Aase began to testify concerning recent information concerning heavy "traffic" received from other CIs and concerned citizens, at which point defense counsel objected based upon hearsay. RP 80. Det. Aase was then questioned concerning the location of the Appellant's trailer and the controlled purchase operations. RP 81.

Later in his trial testimony, Det. Aase described his observations during execution of the search warrant. RP 138-167. During this line of questioning Det. Aase testified concerning the surveillance camera system. RP 157. Det. Aase testified that he did not observe any items of value inside the residence, other than the methamphetamine, that would require such levels of security like a surveillance system. RP 157.

Det. Aase also testified that the weapons were significant for

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protecting the appellant's narcotics and cash. RP 160. Defense counsel did not object to this testimony. RP 160. Det. Aase further testified that multiple cell phones are common in drug dealing because persons involved in narcotics often use different phones for their drug trades. RP 161. Again, no objection was lodged concerning these questions and answers. RP 161. The body wire recording and a portion of the recorded jail interview with the Appellant were played for the jury. RP 119-132, 173.

The jury returned guilty verdicts as to all counts and enhancements. RP 415-416. CP 60, 61. After hearing from the State and several neighbors from the area of the Appellant's residence, the trial court sentenced the Appellant to one hundred forty-four months (144) in prison. RP 435-444, 461. The court imposed the VUCSA minimum fine of two thousand dollars (\$2,000.00), the two hundred dollar (\$200.00) filing fee, a lab fee of one hundred dollars (\$100.00), a DNA fee of one hundred dollars (\$100.00), and restitution in the amount of two hundred dollar (\$200.00). RP 462-464, CP 86. The Appellant did not object to imposition of any of these assessments. RP 464-468. The Appellant filed timely notice of appeal. CP 95-105.

IV. DISCUSSION

1. THE APPELLANT'S CONVICTIONS SHOULD BE AFFIRMED BECAUSE TRIAL COUNSEL'S DECISION NOT TO INITIALLY OBJECT AND THEN LATER OBJECT BASED UPON HEARSAY WAS REASONABLE AND THE APPELLANT WAS NOT PREJUDICED IN LIGHT OF THE OVERWHELMING EVIDENCE OF GUILT.

The Appellant first argues that his trial counsel was ineffective for failing to object to what he characterizes as "propensity evidence." This claim is predicated upon Det. Aase's testimony concerning describing how his investigation into the Appellant began. The issue presented is premised upon a mischaracterization of the purpose of the evidence. Here, the testimony was in response to the prosecutor's question concerning how the investigation began. RP 80. The testimony in response was therefore not offered as evidence of prior bad acts, nor was it elicited to show that the Appellant dealt drugs before and must be doing it again. It was by way of explanation why Det. Aase began focusing on the Appellant and to provide a narrative explanation for the progression of the investigation. As such, the testimony was not specifically objectionable on the basis of improper ER 404(b) evidence. In any event, counsel was not ineffective for failing to object.

To establish ineffective assistance of counsel, the Appellant must show that (1) his counsel's performance was deficient in that it fell below an objective standard of reasonableness under the

circumstances and (2) he was prejudiced as a result of his counsel's performance. See State v. Larios-Lopez, 156 Wn. App. 257, 262, 233 P.3d 899 (Div. II, 2010). Legitimate trial strategy or tactic cannot serve as the basis for a claim of ineffective assistance of counsel. See State v. Kylo, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). A defendant is prejudiced by counsel's deficient performance if, but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Reviewing courts presume that defense counsel's representation was effective, and the Appellant must demonstrate that there was no legitimate or strategic reason for defense counsel's conduct. *Id.* at 335.

Here, counsel is accused of failing to object to the remark of Det. Aase concerning his knowledge and awareness of the Appellant's prior drug activities. However, failing to object under these circumstances was clearly sound trial strategy. See, e.g., State v. Gladden, 116 Wn. App. 561, 568, 66 P.3d 1095 (Div. III, 2003)(*failure to object to witness's unsolicited remark could be described as legitimate trial tactic to avoid drawing attention to information defense counsel sought to exclude*). This is confirmed by counsel's subsequent objection to hearsay concerning the information and the officer's basis of knowledge in relation to more recent

information concerning the Appellant's drug activity. First, counsel may have wished to allow the passing comment to fade into the courtroom paneling, but thereafter, the detective related more information he had received, at which point counsel decided to object, as the testimony was no longer merely passing comment. Further, by objecting on the basis of hearsay, trial counsel shrewdly communicated to the jury that Det. Aase was only relating what he had been told and that he had no personal basis of knowledge. To object based upon "prior bad acts" would lend credence to the assertion that the Appellant had prior drug dealing history and unduly highlight this fact for the jury. This was sound trial strategy and cannot be the basis for a claim of ineffective assistance. Counsel's performance did not fall below objective standards of reasonableness.

Finally, in light of the overwhelming evidence in this case, the Appellant suffered no prejudice. Two controlled purchases, including one with audio recording, confirmed the Appellant's ongoing drug dealing. Further, the fruits of the search warrant demonstrated the extent of his criminal enterprise. A large quantity of methamphetamine found in his bedroom, along with packaging consistent with sales and identical to the baggies used in the two controlled purchase, scales, and other items of evidence showed the Appellant to be deeply entrenched in methamphetamine distribution.

The search warrant also resulted in additional corroboration for the second controlled purchase, where the pre-recorded money was recovered from the Appellant himself. Finally, the Appellant's own recorded admissions to dealing a quarter pound of methamphetamine per week remove any concern that Det. Aase's passing comments concerning the Appellant's history of narcotics involvement had any impact whatsoever on the jury's determination of guilt. The Appellant's claim that if trial counsel objected to the Det. Aase's testimony concerning his knowledge of the Appellant, the outcome would have been different is fallacious.

2. THE DETECTIVE GAVE PROPER OBSERVATION TESTIMONY IN DESCRIBING ITEMS OF EVIDENCE DISCOVERED DURING EXECUTION OF THE SEARCH WARRANT AND THE SIGNIFICANCE OF EACH BASED UPON HIS TRAINING AND EXPERIENCE.

Next, the Appellant claims that Det. Aase gave improper opinion testimony when he testified concerning the significance of surveillance equipment observed at the Appellant's trailer, as well as the existence and placement of weapons in and around the trailer. Because there was no objection at trial, any claim of error was waived and not preserved for appeal. Further, the complained of testimony was not improper opinion testimony and was instead, proper testimony based upon the detective's observations, training, and

experience. Finally, counsel was not ineffective nor was the Appellant prejudiced in light of the overwhelming evidence of guilt.

To preserve a claim of error, the party must object below. See State v. Torres, 198 Wn. App. 864, 876, ___ P.3d ___ (Div. III, 2017)(*"No procedural principle is more familiar than that a constitutional right, or a right of any other sort, may be forfeited in criminal cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."*)(citing United States v. Olano, 507 U.S. 725, 731, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993); Yakus v. United States, 321 U.S. 414, 444, 64 S. Ct. 660, 88 L. Ed. 834 (1944)).

The Appellant claims that the error was preserved when trial counsel objected based upon "speculation." However, ER 103 requires objections to be both timely AND **specific**. See De Haven v. Gant, 42 Wn. App. 666, 669, 713 P.2d 149, 151 (Div. I, 1986)(*emphasis added*). In DeHaven, the Court stated, "Even if an objection is made at trial, a party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial." *Id.* (citing State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985) and State v. Boast, 87 Wn.2d 447, 451, 553 P.2d 1322 (1976)). Here, at trial the Appellant only objected on the basis of speculation. RP 157. The Appellant did not object that the

detective was giving improper opinion testimony. With regard to the baseball bat leaning against the back door and the BB rifle and pistol in the living room area, there was no objection made at all. The issue of "improper opinion testimony" raised herein was not properly preserved by specific objection.

Appellate courts ordinarily will not review a claim of error raised for the first time on review unless one of three exceptions exist. RAP 2.5(a). One exception is if the claim is for a manifest error affecting a constitutional right. RAP 2.5(a)(3). The appellant must demonstrate both that the purported error is of constitutional magnitude and that the error is "manifest." State v. Gordon, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). A "manifest" error is one that is "so obvious on the record that the error warrants appellate review." State v. O'Hara, 167 Wn.2d 91, 100, 217 P.3d 756 (2009). To be "manifest" the Appellant must identify a constitutional error that can be shown, in the context of the trial, to have actually affected the Appellant's rights. See *id.* at 99. See also State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988); State v. Lynn, 67 Wn. App. 339, 346, 835 P.2d 251 (Div. I, 1992). As stated by the Supreme Court:

As this court held in its extended discussion of RAP 2.5(a)(3) in State v. WWJ Corp., there are two components to manifest error. An error is manifest "only if it results in a concrete detriment to the claimant's constitutional rights, and the claimed error rests upon a plausible argument that is supported by

the record.” We have sometimes referred to the requirement to show a “concrete detriment to the claimant’s constitutional rights” as a requirement to show “actual prejudice.”

State v. Koss, 181 Wn.2d 493, 503 n.6, 334 P.3d 1042 (2014). Once an appellant has identified such an error, it is for the State to establish that the error was harmless beyond a reasonable doubt. Gordon, 172 Wn.2d at 676 n.2.

Here, the Appellant makes the logical leap that the detective’s testimony amounted to opinion testimony, straining at the definition of what constitutes opinion. The Appellant further assumes that this “opinion” testimony was improper. The Appellant then concludes that the testimony resulted in a constitutional violation. This is a quagmire of sophistry, which confuses the facts and concludes upon its own thesis.

The general rule is that no witness, lay or expert, may “testify to his opinion as to the guilt of a defendant, whether by direct statement or inference.” State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

In determining whether such statements are impermissible opinion testimony, the court will consider the circumstances of the case, including the following factors: (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) ‘the other evidence before the trier of fact.

State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007)(*internal*

quotes and citations omitted). Here, while the witness was the lead detective on the case, the testimony concerned peripheral items of evidence. Further, the significance of these items and their respective locations might not be apparent to a jury that lacks experience with narcotics activities. Det. Aase did not testify that the Appellant was the drug dealer, *per se*, or express his opinion concerning the Appellant's guilt. Rather, his testimony was that the items located in his residence were commonly associated with distribution of controlled substances. Further, the defense at trial was, effectively, the identity of the drug dealer. Trial counsel never argued that there weren't drugs or drug dealing occurring at the Appellant's trailer. RP 397-404. Instead, he argued that the CI couldn't be believed and that the other occupant, Mr. Mauher, could have been the real drug dealer. RP 397-401. Finally, the other evidence tying the Appellant to the crimes is substantial. The quarter pound of methamphetamine found in his bedroom, and the buy money in his pocket, coupled with his confession to dealing large quantities of methamphetamine made for a substantial quantum of proof. Based upon the facts of the case and the testimony in its proper context, the "opinion" of Det. Aase that the surveillance system was there to protect the only things of value (the methamphetamine) and the location of weapons to protect the operation was not impermissible testimony.

Admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a "manifest" constitutional error. "Manifest error" requires a ***nearly explicit statement*** by the witness that the witness believed the accusing victim. Requiring an explicit or almost explicit witness statement on an ultimate issue of fact is consistent with our precedent holding the manifest error exception is narrow.

Kirkman, 159 Wn.2d at 936 (*emphasis added*). Here, Det. Aase made no such "explicit" or "nearly explicit" statement regarding his opinion of the Appellant's guilt or innocence.

Det. Aase's testimony, even if considered opinion, was entirely proper as based upon his observations, experience, and training:

[T]estimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony.

City of Seattle v. Heatley, 70 Wn. App. 573, 578, 854 P.2d 658, 660 (1993). Here, Det. Aase testified concerning the discovery of certain items and their significance in relation to drug dealing. This testimony was not a comment on the Appellant's guilt. In State v. Sanders, 66 Wn. App. 380, 832 P.2d 1326 (Div. I, 1992), which involved a defendant charged with possession of cocaine with intent to deliver, a police officer opined that the lack of drug user paraphernalia in the defendant's residence indicated drugs were not regularly ingested at that location. Sanders, at 384. The Court therein rejected a claim that the officer's testimony amounted to an opinion

on guilt because the officer did not explicitly state an opinion on guilt or credibility, the testimony was based solely on physical evidence and on the officer's experience, and the testimony was not inconsistent with the defendant's testimony. *Id.* at 388-89. His testimony was therefore not improper and allowable under the rules.

Returning to the issue of whether this claim can even be raised on appeal, it is clear that no error occurred, and therefore no constitutional error can be claimed. Further, any claim of error, at best, can only be characterized as a violation of ER 702, which is merely a error of evidentiary magnitude and is not reviewable if not preserved. See, State v. Stenson, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997). Where it isn't even clear that the officer offered opinion testimony, much less improper opinion testimony, the error can hardly be called "manifest." Finally, under the great weigh of evidence, including the Appellant's confession, demonstrated conclusively the Appellant's guilt, the "opinion" of Det. Aase clearly had minimal, if any impact on the outcome of trial. As such, any claimed error was neither constitutional nor manifest and was further harmless error even beyond a reasonable doubt.

Even where error occurs, reversal is only required if the error was not harmless. State v. Whelchel, 115 Wn.2d 708, 728, 801 P.2d 948 (1990). Constitutional error is harmless when overwhelming

evidence supports the conviction. Welchel, 115 Wn.2d at 728. Nonconstitutional error requires reversal only if it is reasonably probable that the error materially affected the trial's outcome. State v. Halstien, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). Again, and without repeating the overwhelming quantum of proof, the jury's verdict was unaffected by the "offending" testimony and any error was harmless beyond any ascertainable doubt.

3. THE TRIAL COURT PROPERLY IMPOSED LEGAL FINANCIAL OBLIGATIONS.

Finally, and in rather piecemeal fashion, the Appellant challenges the imposition of legal financial obligations. The State will address each assessment and the issue pertaining thereto, but based upon the law, the trial court committed no error in imposing the legal financial assessments. Further, no objection was made to the imposition of any legal financial obligations so the issue was not preserved and should not be reached. See RAP 2.5, *supra*.

A. Imposition of the VUCSA fine is discretionary and does not require consideration of the Appellant's ability to pay.

First, the Appellant challenges the imposition of the VUCSA minimum fine. The Appellant claims that the court was required to consider his indigence in imposing the fine. RCW 69.50.430(2)

provides in pertinent part:

On a second or subsequent conviction⁵ for violation of any of the laws listed in subsection (1) of this section, the adult offender ***must be fined*** two thousand dollars in addition to any other fine or penalty imposed. Unless the court finds the adult offender to be indigent, this additional fine may not be suspended or deferred by the court.

(Emphasis added). This fine is mandatory and "cannot be waived unless the court makes a finding of indigency." State v. Cowin, 116 Wn. App. 752, 760, 67 P.3d 1108 (Div. II, 2003). The Appellant appears to argue that, because the Appellant was determined to be indigent, that the Court necessarily was required to waive the fine. That is incorrect. The court may only waive the fine ***IF*** the court finds the Appellant indigent. See RCW 69.50.430; see also Bale v. Allison, 173 Wn. App. 435, 450, 294 P.3d 789 (Div. I, 2013)(*use of the term "may" is permissive, not mandatory*).

The Appellant further argues that the court ignored its discretion to waive the VUCSA minimum fine. If this were true, this would constitute abuse of discretion. See State v. Miller, 181 Wn. App. 201, 216, 324 P.3d 791 (Div. II, 2014)(*sentencing court's failure to recognize its own discretion is an abuse of discretion which necessitates resentencing unless the reviewing court is confident the*

⁵The Appellant did not and does not dispute that, at the time of sentencing, he had three prior felony convictions for violation of RCW 69.50.401.

sentencing court would reach the same result). The Appellant points to the court's statement that it was only imposing the VUCSA fine because it was "mandatory." RP 463. However, this is in response to the state's attorney's inquiry regarding a recommended one thousand dollar (\$1,000.00) fine pursuant to RCW 9A.20.021 fine which is purely discretionary. While speaking in terms of "mandatory," the court later further clarified that it was simply the intent of the court not to impose any costs or other assessments where the Appellant's ability to pay must be considered. RP 464.

Imposition of a fine under RCW 69.50.430 only requires the court to consider ability to pay if the court seeks to waive imposition thereof. Fines are otherwise discretionary without regard to ability to pay. See State v. Clark, 191 Wn. App. 369, 375-76, 362 P.3d 309 (Div. III, 2015). Therefore, the trial court did not abuse its discretion in imposing the mandatory fine under RCW 69.50.430.

B. Imposition of the Crime Lab fee is mandatory and does not require consideration of the Appellant's ability to pay.

Next the Appellant complains that the court erred in imposing the crime lab fee. Again, no RCW 43.43.690(1) provides:

When an adult offender has been adjudged guilty of violating any criminal statute of this state and a crime laboratory analysis was performed by a state crime laboratory, in addition to any other disposition, penalty,

or fine imposed, ***the court shall levy a crime laboratory analysis fee of one hundred dollars for each offense⁶ for which the person was convicted.*** Upon a verified petition by the person assessed the fee, the court may suspend payment of all or part of the fee if it finds that the person does not have the ability to pay the fee.

(Emphasis added). The statute requires imposition of the fee. “This assessment is mandatory if a laboratory analysis was conducted.” State v. Clark, 195 Wn. App. at 873. The statute only allows suspension of **payment** upon a verified petition, and only allows suspension of the payment if the offender is found unable to pay. See RCW 43.43.690(1). The imposition of the fee is required regardless of ability to pay. The Appellant’s claim is premature. He should not be heard until such time as the State undertakes efforts to collect. See State v. Lundy, 176 Wn. App. 96, 108, 308 P.3d 755 (Div. II, 2013). The language of the statute further precludes the Appellant’s claim that counsel was ineffective for failing to raise the issue, because, again, the court was obligated to impose the fee.

- C. Imposition of the criminal filing fee is mandatory and does not require consideration of the Appellant’s ability to pay, and its imposition in a criminal conviction is constitutional.

Finally, the Appellant challenges imposition of the filing fee,

⁶In fact, the court should have imposed three hundred dollars (\$300.00) in lab fees as the Appellant was convicted of three felony counts.

claiming that the fee violates equal protection to the extent that it is mandatory, without regard to ability to pay. RCW 36.18.020(2)(h) requires imposition and collection of a two hundred dollar (\$200.00) filing fee upon conviction for any crime. The statute has no requirement that the court consider the ability of the offender to pay and does not so require. See State v. Lundy, 176 Wn. App. at 103. See also State v. Gonzales, 198 Wn. App. 151, 392 P.3d 1158 (Div. II, 2017), State v. Stoddard, 192 Wn. App. 222, 225, 366 P.3d 474, 476 (Div. III, 2016). The Appellant's arguments to the contrary have been soundly and repeatedly rejected. His claims concerning other lower court's "custom" of violating the law and "waiving" the mandatory assessment does not support his contention, and is tantamount to citing superior court rulings as precedent in this court. Judicial notice of lower courts' decisions should not be taken, because they have no precedential authority. See Boeing Co. v. Aetna Cas. & Sur. Co., 113 Wn.2d 869, 898 n.12, 784 P.2d 507 (1990)(*Chief Justice Callow dissenting*).

The Appellant complains that the decisions in Lundy, Gonzales, and Stoddard should be abandoned and overruled. He complains that the courts' statutory construction analysis is "overly simplified" and therefore "harmful." However, the analysis is simple because there is no need to "construe" the statute. The statute is

clear in its requirements and requires no mental gymnastics to understand. “If the language is unambiguous, a reviewing court is to rely solely on the statutory language.” State v. Roggenkamp, 153 Wn.2d 614, 621, 106 P.3d 196, 199 (2005)(citing State v. Avery, 103 Wn. App. 527, 532, 13 P.3d 226 (Div. II, 2000)). Here, the language clearly and simply states that “the clerk **shall** collect” the filing fee. RCW 36.18.020(2). A contrary holding would render statutes subject to random interpretation and eliminate the legislature’s ability to mandate any particular result or outcome.

Facing this obvious result, the Appellant assails the statute, claiming that it violates Equal Protection. As a starting point, statutes are presumed constitutional. See State v. Reeder, 184 Wn.2d 805, 819 n.12, 365 P.3d 1243, 1250 (2015). The burden is upon the Appellant to demonstrate that the statute is unconstitutional beyond a reasonable doubt. See Markham Advert. Co. v. State, 73 Wn.2d 405, 420, 439 P.2d 248 (1968).

It should be first noted that the Appellant’s complaint goes to a different law than his claim would prefer. He claims that RCW 36.18.020(2)(h) violates equal protection. However, his actual argument is that GR 34, authorizing civil litigants a waiver of fees authorized under the statute, does not do the same for criminal defendants. The court rule and not the statute authorizes the waiver.

The statute makes the fees mandatory to both criminal defendants who are convicted and civil litigants. The Appellant does not claim that GR 34 violates equal protection.

The Appellant cites no cases dealing with the application of GR 34. Appellate courts should not be placed in a role of crafting issues for the parties; thus, mere “naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.” Petition of Williams, 111 Wn.2d 353, 365, 759 P.2d 436 (1988) (internal quotation marks omitted) (quoting In re Rosier, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986)). Therefore, this Court should not consider this new argument.

Furthermore, there is no equal protection violation present in either the challenged statute, RCW 36.18.020(2)(h), or the court rule, GR 34. The Fourteenth Amendment to the United States Constitution and Article I, Section 12 of the Washington Constitution guarantee equal protection under the law. “Equal protection requires that similarly situated individuals receive similar treatment under the law.” Harris v. Charles, 171 Wn.2d 455, 462, 256 P.3d 328 (2011). This court reviews constitutional challenges *de novo*. State v. Vance, 168 Wn.2d 754, 759, 230 P.3d 1055 (2010); State v. Price, 169 Wn. App. 652, 655-56, 281 P.3d 331 (Div. III, 2012).

A criminal defendant and a civil litigant are not similarly

situated. In order to prevail on his claim, the Appellant must first establish that he is similarly situated with other persons in a class who have received different treatment under the same law. See State v. Osman, 157 Wn.2d 474, ¶16, 139 P.3d 334 (2006); State v. Handley, 115 Wn.2d 275, 289-90, 796 P.2d 1266 (1990). Whether a defendant is similarly situated is an inquiry that is determined by and relative to the purpose of the challenged law. See State v. Manussier, 129 Wn.2d 652, 673, 921 P.2d 473 (1996). A civil litigant seeking recuperation of financial loss, or injunctive relief is not similarly situated to a criminal defendant who is convicted of violation of the criminal law and subject to incarceration as punishment. The Appellant cannot make the threshold showing.

Reaching beyond this fatal shortcoming, the appropriate level of review in equal protection claims depends on the nature of the classification or the rights involved. State v. Hirschfelder, 170 Wn.2d 536, 550, 242 P.3d 876 (2010). Appellate courts apply a strict scrutiny standard when state action involves suspect classifications like race, alienage and national origin and/or fundamental rights. *Id.* Intermediate scrutiny is applied for semi-suspect classifications and/or important rights. *Id.* Otherwise, courts apply rational basis review. *Id.* Appellant concedes he is not a member of a suspect or semi-suspect class and agrees that rational basis review applies here. Brief at 23.

Rational basis review is a highly deferential standard, and courts will uphold a statute under this standard unless it rests on grounds wholly irrelevant to the achievement of legitimate state objectives. In re Det. of Stout, 159 Wn.2d 357, 375, 150 P.3d 86 (2007). The rational basis test requires only that the means employed by the statute be rationally related to a legitimate state goal; the means do not have to be the best way to achieve the goal. See Manussier, 129 Wn.2d at 673. “[T]he Legislature has broad discretion to determine what the public interest demands and what measures are necessary to secure and protect that interest.” State v. Ward, 123 Wn.2d 488, 516, 869 P.2d 1062 (1994).

There is a rational basis for treating civil litigants entering the justice system differently than indigent criminal Appellants already in the system and convicted of a criminal offense. The former seeks access to justice while the later has received access to justice. The State effectively pre-paid for the Appellant's access to justice when it filed the charges against him. There was no advance requirement that he pay a filing fee to get into court, as there is in civil cases. It is only upon a criminal Appellant's conviction that he or she is required to pay a filing fee. GR 34 allows the waiver of mandatory filing fees for indigent civil litigants to provide equal access to justice. Jafar v. Webb, 177 Wn.2d 520, 526-32, 303 P.3d 1042 (2013). Without such a waiver, indigent parties would not be able to seek relief or otherwise

gain access to the courts. *Id.* at 529-31. Further, like the State in a criminal prosecution, a successful litigant can recoup the filing fee as part of a judgement in a successful suit. See RCW 4.84.010(1).

Lastly, the criminal Appellants are authorized to seek remission of these mandatory costs under RCW 10.01.160(4), under the same criteria as that providing waiver of fees to indigent civil litigants under GR 34. “[C]ourts can and should use GR 34 as a guide for determining whether someone has an ability to pay costs.” City of Richland v. Wakefield, 186 Wn.2d 596, 606, 380 P.3d 459 (2016). There is no real difference in the procedure. The Appellant has failed to establish, as is his burden, an equal protection violation, or the unconstitutionality of the statute.

V. CONCLUSION

The Appellant was aptly and adequately represented by counsel. No improper testimony was offered nor did the Appellant suffer prejudice therefrom. Evidence of the Appellant's guilt was overwhelming and any error, even had it been properly preserved, was harmless in any event. The court imposed only legal financial obligations which were either mandatory or assessable without regard to the Appellant's ability to pay. His constitutional attack upon the statute is without merit. This appeal should be denied and the jury verdict and Judgement and Sentence should be affirmed. The State

respectfully requests this Court affirm the Appellant's convictions and the sentence imposed below.

Dated this 13th day of September, 2017.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Curt L. Liedkie", is written above a horizontal line.

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**COURT OF APPEALS OF THE STATE OF
WASHINGTON - DIVISION III**

THE STATE OF WASHINGTON,

Respondent,

v.

MARKHAM M. W. WELCH,

Appellant.

Court of Appeals No: 34764-8-III

DECLARATION OF SERVICE

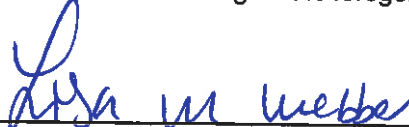
DECLARATION

On September 13, 2017 I electronically mailed, through the portal, a copy of the BRIEF OF RESPONDENT in this matter to:

KEVIN A. MARCH
Sloanej@nwattorney.net

I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.

Signed at Asotin, Washington on September 13, 2017.



LISA M. WEBBER
Office Manager

**DECLARATION
OF SERVICE**

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ASOTIN COUNTY PROSECUTOR'S OFFICE

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